

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DALE HARTKEMEYER (AKA SEIGEN)

Plaintiff,

FATHER MARK O'KEEFE,

Intervenor,

v.

WILLIAM P. BARR, in his official
capacity as the Attorney General of the
United States; MICHAEL CARVAJAL, in
his official capacity as the Director of the
Federal Bureau of Prisons; and T.J.
WATSON, in his official capacity as
Complex Warden for Terre Haute Federal
Correctional Complex,

Defendants.

Case No. 2:20-cv-00336-JMS-DLP

RESPONSE TO COURT'S ORDER DATED JULY 12, 2020 (ECF No. 79)

Defendants, by and through counsel, respectfully respond to the Court's Order dated July 12, 2020 (ECF No. 79) as follows:

The Federal Bureau of Prisons (BOP) plans to take significant measures to mitigate the potential spread of COVID-19 to Rev. Hartkemeyer and Father O'Keefe, who have been designated by Mr. Purkey and Mr. Honken as their respective spiritual advisors. (ECF No. 33-1, Winter Decl. ¶ 4; ECF No. 52-1, Winter Decl. ¶ 4.) BOP has granted Rev. Hartkemeyer permission to be present with Mr. Purkey before, during and after the Mr. Purkey's execution on

July 15, 2020, and has granted Father O’Keefe the same permission with respect to Mr. Honken’s execution, scheduled for July 17, 2020. (ECF No. 33-1, ¶ 4; ECF No. 52-1, ¶ 4.)

If Rev. Hartkemeyer and Father O’Keefe choose to visit Mr. Purkey and Mr. Honken in the days before the scheduled execution, they will be given the opportunity to utilize Personal Protective Equipment (“PPE”), in the form of a surgical face mask, gloves, a gown, and a plastic face shield upon their arrival at FCC Terre Haute. (ECF No. 33-1, ¶ 8.) They will be escorted through security by BOP staff wearing face masks to a visiting room only utilized by visitors of inmates in the Special Confinement Unit (“SCU”). The visiting room allows non-contact visitation—i.e., the inmate is separated from his visitor by a partition—and is sanitized after each use. Rev. Hartkemeyer and Father O’Keefe will also be given access to hand sanitizer and a restroom with a sink and hand soap. (ECF No. 33-1, ¶ 8.) During any such visit, Rev. Hartkemeyer and Father O’Keefe will have no interaction with any other inmates housed at SCU or elsewhere. Additionally, they will have no interaction with other visitors or members of the public at the SCU because regular visitation remains suspended due to COVID-19. (ECF No. 33-1, ¶ 9.) If multiple inmates scheduled for execution have visitors, such visits will take place in separate areas. (ECF No. 33-1, ¶ 9.)

As for their visit to the execution facility on the day of the execution, by design, Rev. Hartkemeyer and Father O’Keefe will have very limited interaction with other individuals in the execution facility. (ECF No. 33-1 ¶ 7; *see also* ECF No. 52-1.) Their visit with the respective inmate will again be non-contact. The equipment and surfaces in the area of the visit will be disinfected prior to use. At the conclusion of the visit, Rev. Hartkemeyer and Father O’Keefe will be escorted away from the visiting area of the execution facility. They will not have direct interaction with, nor be near, the vast majority of individuals expected to be present for the

executions. (ECF No. 33-1 ¶ 10.) Their only possible interaction with other attendees of the execution may be with the inmates' attorneys, who, like other witnesses, will be provided PPE. (ECF No. 33-1 ¶ 10.) Each designated BOP employee who escorts the spiritual advisors through the execution facility will be wearing an N-95 face mask, a face shield, and gloves. (ECF No. 33-1 ¶ 12.) In addition, prior to the execution, Father O'Keefe will be given the opportunity to physically touch Mr. Honken in the holding cell of the execution facility to provide the Last Rites. (ECF No. 52-1 ¶ 7.)

The procedures set forth by Mr. Winter's declarations are consistent with guidelines issued by the Centers for Disease Control and Prevention ("CDC") for correctional facilities and detention centers during the outbreak of COVID-19. (*See* Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited July 13, 2020)). These guidelines recommend ways in which correctional facilities and detention centers can continue to carry out essential public services while protecting the health and safety of all incarcerated and detained persons, staff, and any visitors, which include the spiritual advisors of the inmates scheduled for execution.

As for the ventilation system in the execution facility, neither Plaintiffs nor their experts have identified any changes that would allow the executions to proceed promptly. BOP cannot overhaul its ventilation system at this late date. Indeed, the most recent scientific brief from the World Health Organization ("WHO") on potential airborne transmission of COVID-19 does not suggest that transmission could occur through ventilation systems in a setting such as this and with the mitigation measures BOP has put in place. (WHO Scientific Brief, Transmission of SARS-CoV-2: implications for infection prevention precautions, July 9, 2020,

<https://www.who.int/publications/i/item/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations> (last visited July 13, 2020)). The WHO scientific brief notes that although the airborne transmission of COVID-19 is still under “active[] discuss[ion] and evaluat[ion],” (*id.* at 1.), in “health care settings where symptomatic COVID-19 patients were care for . . . no studies have found viable virus in air samples.” (*Id.* at 2.) In fact, “clinical reports of health workers exposed to COVID-19 index cases, not in the presence of aerosol-generating procedures, found no nosocomial¹ transmission when contact and droplet precautions were appropriately used, including the wearing of medical masks as a component of the personal protective equipment (PPE).” (*Id.*) In other words, the WHO’s most recent analysis indicates that wearing PPE even in clinical settings where COVID-19 is known to exist prevents transmission of the disease. As noted above, Rev. Hartkemeyer and Father O’Keefe will be provided surgical masks, face guards, gowns, and gloves.

To be sure, the WHO cannot rule out the possibility of short-range aerosol transmission, particularly in specific indoor locations, such as crowded and inadequately ventilated spaces over a prolonged period of time with infected persons. Specifically, outside of medical facilities, reports of outbreak related to indoor crowded spaces have suggested the possibility of airborne (or “aerosol”) transmission, combined with droplet transmission—for example, during choir practice, in restaurants or in fitness classes. (*Id.*) However, the WHO notes that detailed investigations of these clusters suggest that droplet and fomite [i.e., contaminated surface] transmission could also explain human-to-human transmission within these clusters. (*Id.*) Further, the close contact environments of these clusters may have facilitated transmission from

¹ Nosocomial is defined as a disease “originating in a hospital.” *See* <https://www.lexico.com/en/definition/nosocomial>.

a small number of cases to many other people (*e.g.*, superspreading event), “especially if hand hygiene was not performed and masks were not used when physical distancing was not maintained.” (*Id.*) Of course, studies concerning individuals singing, eating, or exercising are not significant here because those individuals are not wearing masks, face guards, gowns or gloves, as will be Rev. Hartkemeyer and Father O’Keefe.

The WHO scientific brief confirms that concerns about the execution facility’s ventilation system are unfounded in light of the circumstances and measures the BOP intends to take to mitigate the risk of transmission. BOP has adopted the least restrictive means for purposes of Rev. Hartkemeyer’s and Father O’Keefe’s visits to the FCC Terre Haute.

As for the FCC Terre Haute staff member who tested positive for COVID-19, he did not come into contact with the BOP Execution Protocol team, nor does he recall coming into contact with any members of the Crisis Support Team (CST), who are involved in victim witness transportation and logistics. (Winter Declaration, ECF No. 77-1, ¶ 7.) Moreover, during the two-and-a-half-day period while he was at work and after being exposed to COVID-19, the staff member did not visit the execution facility or the adjacent command center, nor does he recall being in the witness staging area or any of the vehicles that will transport witnesses for the executions. (ECF No. 77-1, ¶ 8.)

BOP has taken steps to determine with whom the staff member was in contact, and will continue to take steps consistent with the CDC’s guidelines. Specifically, for the duration of the execution or until a negative test is obtained, BOP will ensure that those staff members identified as having had contact with the infected staff member do not have contact with the inmates scheduled for execution, ministers of record, witnesses of the execution, attorneys, or press. In addition, BOP will continue to perform the mitigation measures consistent with including

temperature check and symptom screen all individuals arriving at FCC Terre Haute. (ECF No. 77-1, ¶¶ 9-10.) These steps comport with the current CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities.

These are the least restrictive means that BOP can offer consistent with its operational and security needs and the Government's current execution schedule. The Religious Freedom Restoration Act does not require more.

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By: s/ Shelese Woods
Shelese Woods
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2020, the foregoing was filed electronically through ECF/CM. On this same date, electronic service will be made to all counsel of record through the Court's ECF/CM system.

s/ Shelese Woods
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